

DONALD ROBERT GREENE, )  
 )  
Plaintiff/Appellant, ) Appeal No.  
 ) 01-A-01-9509-CV-00405  
v. )  
 ) Davidson Circuit  
SARAH L. SMITH GREENE, ) No. 91D-3610  
 )  
 )  
Defendant/Appellee. )

COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

**FILED**  
**January 31, 1996**  
**Cecil W. Crowson**  
**Appellate Court Clerk**

APPEAL FROM THE COURT FOR DAVIDSON COUNTY  
AT NASHVILLE, TENNESSEE

THE HONORABLE WALTER C. KURTZ, CHANCELLOR

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ATTORNEY FOR DEFENDANT/APPELLEE

AFFIRMED AS MODIFIED  
AND REMANDED

MEMORANDUM OPINION<sup>1</sup>

Plaintiff/appellant, Donald Robert Greene ("Husband"), and defendant/appellee, Sarah L. Smith Greene ("Wife"), divorced on 1 April 1992 after having entered into a Marital Dissolution Agreement ("MDA"). The parties executed the MDA, and the court incorporated it into the divorce decree. The pertinent portions of the decree are as follows:

Alimony. Husband shall pay alimony to Wife until his death, her death or her remarriage as follows:

a. \$3,200.00 per month for a period of three (3) years beginning on the first day of the first month following closing of sale on the parties' home property.

b. \$2,000.00 per month thereafter.

c. Alimony payments shall be paid in hand or postmarked by the first day of each month.

d. All alimony payments provided for in this Agreement are deductible by Husband and taxable as income to Wife except for the \$2,000 payment to Wife's attorney.

....

Automobile. Husband hereby agrees that all of his right, title, interest and equity in the 1991 Volvo automobile, Identification Number YV1AA8857M1895240, shall be divested out of him and be vested solely in Wife. In lieu of paying for Wife's automobile, Husband shall pay an additional \$400 per month in alimony for one (1) year after the house sells, and \$200 per month thereafter for two and one-half years (2 1/2), for a total payment of \$10,800. This alimony shall terminate only upon Wife's death. Wife will be responsible for her own car insurance.

Husband acknowledges that he can afford to make this payment and that it is for Wife's necessary support and maintenance. He acknowledges that these payments are not dischargeable in bankruptcy.

The decree also provided that Wife was to receive a vested

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<sup>1</sup>Court of Appeals Rule 10(b):

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

interest in one-half of Husband's Connecticut Mutual Life Insurance Company XGA-vested interest account and that Husband would pay Wife one-half of each gross payment he received from the vested interest account until such time as the insurance company began to make payments directly to Wife. In addition, Wife was to reimburse Husband for any additional taxes Husband incurred because of Wife's share of the funds being added to his income.

In May 1994, Wife filed a petition for contempt alleging that Husband had failed and had refused to pay alimony as ordered by the court. She alleged that he owed her \$4,991.27 as of 2 May 1994 and that his arrearage was willful and contemptuous. Wife asked the court to find him guilty of both civil and criminal contempt and to have him incarcerated. She also sought a judgment for the alimony arrearage.<sup>2</sup> In July 1994, Husband answered and filed a counter-petition. He admitted in his answer that he had failed to pay the alimony as ordered by the court and that his failure was due to his inability to comply with the court's order in that there had been a drastic change in his financial circumstances since the entrance of the court's order. He admitted that he owed the petitioner \$4,991.27 as of 2 May 1994, but denied that his failure to pay the alimony was willful and contemptuous of the court.

In his counter-petition, Husband alleged that there had been a material and substantial change in his circumstances since the entrance of the final decree, that his income had been drastically reduced from earnings in excess of \$150,000 per year to earnings of

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<sup>2</sup>Prior to Wife's filing her petition for contempt, Husband had filed a petition for modification of alimony in January 1993. He alleged that "his prior employment as an insurance agent had paid him an annual income of approximately One Hundred and Fifty Thousand Dollars (\$150,000.00), that he lost this employment, was presently unemployed and needed a substantial decrease in his obligation to pay alimony." The trial court found as follows: "The petitioner's proof viewed in the light most favorable to petitioner having failed to support his claim to the change in circumstances, it is therefore ... dismissed." There was no appeal from this order.

less than \$30,000 per year, and that he had exhausted his means to comply with the court's order including filing bankruptcy. Wife denied that there was a material and substantial change in Husband's circumstances.

The trial court found Husband's circumstances had changed and modified the alimony payments as follows: \$1,750 for twenty-four months followed by \$2,500 for twenty-four months, plus an arrearage amount of \$17,216.16. The court also ordered Husband to pay \$2,750 per month from November 1988 until the death or remarriage of Wife. Later, the court decreased the arrearage amount to \$16,107.16.

The first issue is "[d]id the trial court err in its modification of alimony?" Tennessee Code Annotated section 36-5-101(a)(1) provides that the court may, on the application of either party, decree an increase or decrease of alimony upon the showing of a substantial and material change of circumstances. It is not sufficient to simply show a change of circumstances. Instead, it must be a "substantial and material change." Tenn. Code Ann. § 36-5-101(a)(1)(1991). In the instant case, the trial court found that "Mr. Greene's circumstances have changed somewhat since the time of the last hearing in February and March of 1993." The question then is whether the change was substantial and material. "The change in circumstances must be shown to have occurred after the entry of the divorce decree, and must not have been foreseeable at the time the decree was entered into." *Elliott v. Elliott*, 825 S.W.2d 87, 90 (Tenn. App. 1991).

When a decree has been modified in regard to alimony, "the order entered in that proceeding is res judicata, so that one cannot maintain a second petition for modification unless it can be shown that since the entry of the order on the first petition for modification there has been a substantial change of circumstances."

*Jones v. Jones*, 784 S.W.2d 349, 352 (Tenn. App. 1989)(quoting 24

Am. Jur. 2d *Divorce and Separation* § 711 (1983)(footnotes omitted)).

Husband contends that there was a substantial and material change of circumstances which would warrant a reduction in alimony payments by the trial court. We believe the evidence supports this contention. Further, the record shows that, while the trial court was of the opinion that it was granting Husband some temporary relief, the modification actually increased Husband's obligation.

The undisputed evidence shows that Husband lost his job through no fault of his own. His regional manager testified that he did not "see anything that Mr. Greene was doing or failing to do that led [him] to believe that [Mr. Greene] simply wasn't giving th[e] company an effort." It was Wife's contention that Husband voluntarily left his position to pursue a new career on his own; however, the direct testimony of Mr. Miller refuted that contention. There was evidence that the insurance company would have sought Husband's resignation earlier if the company had not felt that Mr. Greene was doing all he could to make his area profitable. The record further showed that Husband went to several "headhunters" attempting to find comparable employment; however, he was fifty years of age at that time.

Husband had sought a reduction in alimony in February 1993 which the court denied. His change of circumstances since February 1993 was that his alimony obligation forced him to borrow money and then forced him into bankruptcy. Because of the nature of his business and his age, the bankruptcy drastically impacted his employability in the insurance and financial planning industry. Husband's inability to regain his former level of income and his subsequent bankruptcy were not in the contemplation of the parties at the entry of the final decree and were substantial and material

changes.

We are of the opinion that the evidence supports the finding that the change of circumstances was substantial and material. We are also of the opinion that the trial court's order amounted to an increase in Husband's obligation, that the increase was punitive in nature, and that the increase was not supported by a preponderance of the evidence. The record supports a finding that Husband has made numerous efforts to increase his income. When the entire record is taken into consideration, the modification, as made by the trial court, was improper because Husband proved that his ability to pay had decreased and Wife failed to prove that her need had increased.

After full consideration of this record, we hold that the judgment of the trial court should be modified to award Wife alimony of \$2,000 per month until her remarriage or death. Each year, Husband shall furnish a copy of his tax return, as filed with the Internal Revenue Service, to Wife and/or her attorney. In the event there is a change in circumstances, either party may petition the court for either an increase or decrease of the alimony amount.

We have also considered Husband's contention that the trial court erred in awarding Wife attorney's fee of \$3,000.00. We find nothing in the record to support this contention. This issue is without merit.

Therefore, it results that the judgment of the trial court is affirmed as modified by this opinion, and the cause is remanded to the trial court for the entry of an order in conformity with this opinion and for any further necessary proceedings. Costs on appeal are taxed one-half to Husband and one-half to Wife.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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HENRY F. TODD, P.J., M.S.

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BEN H. CANTRELL, J.